



DOCKET FILE COPY ORIGINAL

July 30, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RECEIVED

JUL 31 1998

COMMUNICATIONS SECTION

Re: Annual Assessment of the Status of Competition in Markets for the Delivery of
Video Programming, CS Docket No. 98-102

Dear Ms. Salas:

The Satellite Broadcasting and Communications Association (SBCA) respectfully submits the attached comments for consideration in the above-captioned proceeding. Please find enclosed an original and nine copies pursuant to the Commission's rules to be distributed to the appropriate parties.

Sincerely,

Andrew R. Paul
Senior Vice President

ARP/mh
Enclosures

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission

Washington, D.C. 20554

JUL 11 1998

In the Matter of

Annual Assessment of the Status of
Competition in Markets for the
Delivery of Video Programming

)
)
)
)
)

CS Docket No. 98-102

NOTICE OF INQUIRY

**COMMENTS OF THE
SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION**

Andrew R. Paul
Senior Vice President
Satellite Broadcasting &
Communications Association
225 Reinekers Lane
Suite 600
Alexandria, VA 22314

July 31, 1998

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)

Annual Assessment of the Status of)
Competition in Markets for the)
Delivery of Video Programming)

CS Docket No. 98-102

NOTICE OF INQUIRY

**COMMENTS OF THE
SATELLITE BROADCASTING AND
COMMUNICATIONS ASSOCIATION**

The Satellite Broadcasting and Communications Association ("SBCA") is pleased to submit to the Commission its comments in the above-referenced proceeding. This Notice of Inquiry has become an important component in the Commission's efforts to create a competitive video marketplace which will offer American consumers diversity and choice in programming and price. It is an opportunity for the Direct-To-Home ("DTH") satellite industry to present the many, varied factors which affect its ability to fully compete against other multichannel video programming distributors, namely cable. In fact, there have been many developments since the last Annual Assessment, in both the marketplace and in the regulatory arena, which are having a major impact on how effectively the industry is performing.

For example, on July 10, 1998, the U.S. District Court in Miami, FL, issued an preliminary injunction against PrimeTime 24, enforcing certain provisions of the Satellite Home Viewer Act. That decision was followed a week later by a summary judgment against PrimeTime 24 in U.S. District Court in Raleigh, NC, concerning ABC distribution in the Raleigh DMA. Because the Miami court order is retroactive to March, 1997, we expect that as many as 1.2 million satellite subscribers could lose their network service because the terms of the injunction were so harsh. Unfortunately, the "white area" provision of the SHVA makes determination of subscriber eligibility a difficult matter, and the court injunction only complicates it further. Partly in response to the confusion that the Miami injunction is causing, the National Rural Telecommunications Cooperative (NRTC) has filed an emergency petition asking the FCC to define Grade B signal intensity as a reception standard for consumers under the Satellite Home Viewer Act. The SBCA has filed in support of the NRTC proposal as to the need for such a standard. We believe that defining the Grade B standard in the context of SHVA deserves the Commission's attention.

This is just one of the many barriers with which the DTH industry must deal in order to gain full competitiveness with cable. We will review the principal barriers in significant detail so the Commission has a better view of the current state of the DTH industry, and what must be done to improve the regulatory and competitive climate under which it operates.

This year's competition report covers two basic areas. Sections II and III deal with the DTH marketplace, and Section IV is a discussion of the regulatory environment in which DTH operates and the associated barriers the industry faces. These are some of the principal highlights:

- The DTH industry continues its progress in becoming the most viable competitor to cable.
- Consumer demographics indicate that more and more DTH households are passed by cable, and that customer satisfaction with their DTH systems is high.
- The "white area" restrictions of the SHVA continue to create marketplace uncertainty and confusion among consumers.
- The FCC should define the Grade B signal standard in the context of its appropriateness as a consumer television viewing standard for the purposes of the SHVA.
- The DBS industry needs flexibility and the freedom to select high quality programming in order to meet its obligations under the Commission's yet to be issued Public service obligation rules.

I. INTRODUCTION.

The DBS service, which is the predominant sector in the DTH industry, continues to show rapid growth. The pertinent subscriber data, compiled by the SkyTRENDS economic reporting program, is contained in the next section. We attribute that growth to several factors. The first is the high resolution digital video and audio which only DBS offers among current video providers. Another is easy market access to DBS systems by consumers that has been further enhanced by the now large number of retail outlets which sell the equipment and programming. They include

independent retailers, consumer electronics stores which obtain product through buying cooperatives, and the large retail chains such as Circuit City, Radio Shack and Sears. Finally, the program choices and value offered through both DBS and C-Band are of a scope and quality that is not matched by cable. The combination of these factors is helping to propel the popularity of DTH at rates and figures which compare favorably to last year's reporting.

The basic configuration of the DTH industry remains the same, although as with any industry in its formative stage, the players may change. There are now four major DBS providers¹ instead of the five which existed last year. The assets of the now defunct Alphastar have been purchased by Champion Holdings which has shifted its satellite focus to providing business communications rather than DTH. Interest in DBS by telecommunications carriers remains high, however. While AT&T is no longer participating in DBS distribution, Bell Atlantic, SBC and GTE have entered the market as distribution partners of DIRECTV and USSB. Pegasus Communications, owner of television broadcast properties, has entered the DBS market through the purchase of NRTC territories for DIRECTV program distribution rights. Another broadcast enterprise, Capitol Broadcasting Co., has created a new subsidiary, LocalTV, for the purpose of using satellite to provide all high-power local signals in the U.S. to DBS providers. Echostar is already offering "local-into-local" service in several cities through its Ku-Band slots at 61 degrees.

The ability to compress digitally and the resulting increased channel capacity of DBS systems has created opportunities for new programming services to gain access to video

subscribers sooner than if they queued up for the limited availability of cable channels. A number of program services saw their debut on DTH platforms before becoming available for cable carriage. According to our research, some of these are:

- Military Channel
- Game Show Network
- CNNfn
- SHOWTIME EXTREME
- Fox News Channel
- M2
- ZDTV
- ESPNEWS
- America #1 TV
- HBO Family
- Arts Network
- SUNDANCE

Clearly DTH consumers have benefited by the addition of new program offerings. DTH has enabled more creative services and niche programming to be available to the public which is a meaningful reflection of the value of both the Commission's and Congress' competitive video policies.

II. DTH SUBSCRIBER GROWTH AND PENETRATION.

We commented last year on the unique competitive situation of DTH companies in the marketplace. While cable operators distribute video programming in their local service areas virtually unfettered, the DTH industry enjoys no such luxury. Because of the ubiquitous footprints of the satellites employed by each of the major providers, DBS companies face immediate "effective competition" while the majority of cable operators continue to be the dominant video distributors in their service areas. DBS providers compete with each other, as well as with cable, for subscribers. There is virtually no head-to-head cable competition, on the other hand, so cable operators have felt free to raise their rates at a national average of 7.6 percent each year. It is our hope that growing price competition from satellite may finally spare

¹ They are EchoStar, DIRECTV, PrimeStar and USSB. Alphastar declared Chapter XI bankruptcy in 1997.

cable subscribers from never-ending cable rate increases (or, more hopefully, because they switch to DTH).

DTH subscriber growth continues along the lines that the industry has expected. As the peak fall selling season approaches, DTH will have well over 10 million subscribers as we enter 1999. This is on track with SBCA's estimates of 12 million subscribers by the year 2000.

SkyTRENDS, which conducts SBCA's economic and database program, has compiled the following subscriber counts for the 12-month period ending July 1, 1998. The figures are based on proprietary reports received directly from the DBS providers and the Access Control Center for the C-Band services.

<u>Service</u>	<u>#Subscribers (millions)</u>
DBS	7.254
<u>C-Band</u>	<u>2.028</u>
Total	9.282

The increase in gross numbers of subscribers is 28.36% over the previous rolling 12-month period subscriber total of 7,231,472. These totals represent an increase of 2,050,953 subscribers for the period July 1, 1997 - July 1, 1998, compared to the 1,993,539 subscribers gained from July 1, 1996 - July 1, 1997. Per day subscriber penetration also increased from 5,462 for the period 1996-1997, to 5,619 for 1997-1998. The following chart displays more vividly the annual subscriber increases for all DTH, growth rates, and per day penetration rates.

DTH Subscriber Base²

² All subscriber data has been readjusted to account for subscriber "churn" not previously reported, and "double counting" of households which own more than one DTH receiver.

	<u>Total DTH</u>	<u>Total DBS</u>	<u>Total C-Band</u>
June 30, 1994	1,992,808	70,000	1,922,808
June 30, 1995	3,424,349	1,103,000	2,321,349
June 30, 1996	5,237,933	2,901,000	2,336,933
June 30, 1997	7,231,472	5,047,000	2,184,472
June 30, 1998	9,282,425	7,254,200	2,028,225

Percent Growth (Loss) June 30- June 30

94-95	71.84%	1,475.71%	20.73%
95-96	52.96%	163.01%	0.67%
96-97	38.06%	73.97%	(6.52%)
97-98	28.36%	43.73%	(7.15%)

New Subscribers/Day June 30-June30

94-95	3,922	2,830	1,092
95-96	4,969	4,926	43
96-97	5,462	5,879	(418)
97-98	5,619	6,047	(428)

Several trends emerge from examining the data. (See Appendix A for month-by-month subscriber data) For example, while the DBS growth rate decreases, by necessity, as the basis for measurement increases, DBS subscriber growth remains at approximately 2 million plus per year

for the past two 12-month measurements periods. In addition, per day DBS gains have increased from 5,879 to 6,047.

We also reported last year that, while C-Band showed a decline, a stable base of viewers continues to make that market viable. Our data again show a small decrease in subscribers as their systems begin to age, and they are motivated to change to DBS. However the program market for C-Band remains highly competitive among the "packagers" who are active in program sales, even though there have been net subscriber losses the past two years. In fact, the existing C-Band base is approximately 100,000 higher than that of June, 1994, a reflection of the continued high quality and vast program choice available to consumers using the larger dishes. In addition, leading retailers have informed us that there has recently been a brisk business in retrofitting older C-Band systems from consumers who prefer the larger dish technology.

DTH penetration by state, shown in Appendix B, is also a good indicator of the marketplace progress of DTH. Last year we reported that 24 states showed 10% or more DTH penetration of television households: 5 states at 15% or more; and 2 states above 20%. Overall penetration was 7.2% on a base of approximately 100 million TVHH's. This year, 34 states have DTH penetration of over 10%; 14 states have 15% or more; and 3 states are over 20%, with Montana on the verge of attaining a 30% penetration rate. DTH has reached approximately 9.2% of TVHH's.

III. DTH CONSUMER DEMOGRAPHICS.

SBCA is continuing to build its economic and consumer research capabilities in an attempt to further chart its progress in the marketplace. The SkyTRENDS program with which the Commission is already familiar focuses on industry data and financials. As a complement to that, the Association conducts surveys on a regular basis to better track consumer trends and to identify the specific features and circumstances of DTH subscribers that may set them apart from other video customers.

In March, 1998, the SBCA conducted a survey of 1,250 DTH subscribers, comprised of 250 users for each DBS provider, and 250 C-Band customers³. The questions were designed to elicit comprehensive demographic data from the DTH universe, and were often tailored to the specifics of the DTH program marketplace. The responses confirmed the progress that DTH has been making in developing a viable subscriber base. Of special relevance were the responses dealing with satellite penetration in cabled areas; television antenna systems used by DTH consumers; and rating of service from video providers.

A. DTH Penetration.

55 percent of DBS subscribers reported that cable TV was available to them, while 45 percent of C-Band consumers were also passed (the lower number being attributed probably to the generally more rural orientation of C-Band). This compares to last year's consumer study

³ Direct-to-Home Subscriber Study prepared for the SBCA by The Yankee Group, March, 1998.

which indicated that of all DTH consumers surveyed, 44 percent stated that cable was available to them⁴. Our extrapolation of the total DTH universe passed by cable, according to The Yankee Group findings, comes to almost 53 percent, taking into account both C-Band and DBS. It is also interesting to note that the 1998 study showed that only one-quarter of DBS households with access to cable actually subscribed to cable, as did 10 percent of C-Band households. Furthermore, of the DBS households which subscribe to cable, 65 percent take Basic only, 17 percent take Broadcast only, while 18 percent subscribe to full cable service, including premium channels. (See Appendix C)

B. Local Television Channels.

The Yankee Group also performed a revealing analysis of how DTH subscribers in the survey sample acquired local TV broadcast signals. The survey indicates that 66 percent of DBS subscribers receive local channels utilizing internal or external TV antennas. Other means of reception included network service by satellite (15 percent), cable (13 percent), while 11 percent of DBS subscribers and 14 percent of C-Band consumers reported not receiving local TV signals at all. It is somewhat difficult to assess the overall impact of the antenna data because multiple answers were accepted. (See Appendix D)

C. Ratings of Service and Quality Levels.

On the whole, the vast majority of DTH owners expressed great satisfaction with the features of their satellite systems, as well as the quality of the service they receive (see Appendix E). The Yankee Group asked respondents for their ratings of overall level of service of

⁴ See Home Satellite Dish Study prepared by Bruskin Goldring Research, March, 1997.

telecommunications and utility providers. C-Band customers gave their satellite provider a mean rating of 4.6, and DBS households 4.3 (5=excellent), higher than any other service provider. Cable TV companies received a rating of only 3.1. Cellular service providers, local and long distance companies, and electric utilities all received ratings above 4.0. The Yankee Group ratings followed on the heels of the 1997 J.D. Power and Associates study comparing cable and satellite providers.⁵ The study's satellite customer satisfaction rankings showed that Primestar, Echostar and DIRECTV/USSB all ranked significantly higher than cable. So overall, consumers seem to feel strongly about owning a satellite system, and rate satellite service higher than other telecommunications or utility services in general.

The quality of service received by consumers from their providers also showed remarkable satisfaction (see Appendix F). Over 90 percent of the households interviewed rated the overall features of their DTH systems as "excellent" or "good," and approximately 95 percent gave similar ratings to picture and audio quality. Finally, overall service quality from DTH providers was awarded marks of "good" to "excellent" by 88 percent of households in the survey.

IV. DTH GROWTH STILL FACES REGULATORY AND MARKETPLACE HURDLES WHICH MUST BE ELIMINATED.

The growth rate of DTH and the consumer testimonials to the value and quality of the technology speak to the vast potential of DTH to become an even more important competitor to cable. The latter has significant advantages. It is a local service to which consumers have become inured for several decades with relatively no competition whatsoever. Today's average television

⁵ J.D. Power and Associates 1997 Cable/Satellite TV Customer Satisfaction Study.

viewer probably grew up with cable, and a rooftop television antenna may seem to be an obsolete technology. The previous effectiveness of DTH-restrictive municipal ordinances and home owner association rules (now pre-empted by the FCC) can be partly attributed to the cultural penetration that cable has made, coupled with its acceptance by consumers as the "normal" means of watching television.

The satellite industry is working hard to change these perceptions and the habits that have grown up with them. It is a tribute that in the four years since DBS initiated service (June, 1994), more than 7 million households have selected it as their preferred means of watching news, entertainment and sports, in addition to the roughly 2 million extant C-Band homes. This growth has taken place in spite of the fact that the process of acquiring satellite TV is markedly different from cable. The latter performs most typically as a local utility, and any household that is passed by a cable wire has access in return for a (sharply increasing) fee. A satellite consumer does not have the ease of tapping into a wire, but has the advantage of always being "passed" by a satellite footprint in the continental U.S. To gain access to DTH service, consumers must acquire their own system and contract directly with the platform provider for the program package which best suits their needs.

There obviously is something inherently attractive about DTH to have prompted over 9 million households to acquire their own satellite systems rather than choose another video technology. More than 50 percent are passed by cable, and DTH penetration in cabled areas is on the upswing. Across the board, DBS is now giving impetus for satellite growth in more urban and suburban areas as more and more consumers select DBS even though cable is available in

their areas. Interestingly enough, SkyTRENDS research has also found that in the major areas where digital cable is now available, DBS sales run 39 percent higher than sales in other parts of the U.S.

This change in attitude is taking place even though the DTH industry is still faced with obstacles to its growth. The industry's success so far points to the desirability of the technology, the strength of consumer demand, dissatisfaction with cable service, or most probably a combination of the three. But public policy makers must take into account that even though this growth has occurred, the potential for even better performance by the industry rests on its ability to overcome serious regulatory barriers which, of late, have begun to create even greater inequities between DTH and its competitors. We discuss in detail the areas which impact the industry the most.

A. General Copyright Reform: We stated in last year's filing that inequities in the copyright law were creating a "situation rife with tenuousness, unfairness and misinterpretation."⁶ We named the four principal issues relating to copyright which had produced such an unworkable environment. They included: 1) Inequity in the duration of the copyright license between the permanence of the cable license and the sunset of the DTH license;

⁶ SBCA Comments, CS Docket No. 97-141, July 21 1997, page 18.

2) The anti-competitiveness of the 90-day cable rule governing the right of a satellite subscriber to receive distant network signals; 3) The disparity in copyright fees between DTH and cable; and 4) The crying need to resolve the highly contentious "white area" issue.

On another front, SBCA also testified before Congress on two occasions regarding "local-into-local" satellite service, and the need to tailor that service to the national format that satellite brings.

Last year, the Copyright Office was tasked with preparing a report to the Senate Judiciary Committee on statutory copyright licensing. That study was pending during last year's comment period. SBCA both commented in the Office's proceeding, as well as testified during its hearings on the matter. The report was submitted to the Committee on August 1, 1997, and covered precisely those issues which the DTH industry has been grappling with for several years.

Since then, however, matters have grown increasingly contentious. The flaws in the Satellite Home Viewer Act of 1988 have been exacerbated and reinforced through an ill-advised decision by a Copyright Arbitration Royalty Panel that recommended new and higher copyright fees for the DTH industry which were subsequently adopted by the Librarian of Congress. Then, most recently, the court-imposed a preliminary injunction in U.S. District Court in Miami has created new uncertainties for satellite companies attempting to comply with the "white area" restrictions.

Unfortunately, the SHVA was severely flawed at inception, notwithstanding the good intentions of all the interests and Congressional Committees which were party to its enactment. No one at that time could have envisioned the eventual competitive impact the SHVA would have because the DTH industry at that stage comprised about 1.8 million C-Band subscribers - a niche technology at that time, ripe for experimentation with a "free market orientation" in the copyright arena. In practice, its provisions unhappily do not work. They have failed to do as intended, and the brunt of that failure is being borne by consumers - the very group which was intended to benefit from passage of the SHVA from the start.

B. New Copyright Fees: The SHVA of 1994, which extended the original Act, called for a copyright fee adjustment for DTH carriers who marketed superstation and distant network signals, to be determined by a CARP proceeding conducted under the auspices of the Copyright Office.⁷ As we remarked last year, DTH copyright fees prior to the CARP were already higher than cable's for the very same signals. DTH carriers at that time paid 6¢ per subscriber, per month for distant network signals, and either 14¢ or 17.5¢ for superstations, depending on whether or not they carried nationally-cleared programming. At the time of the CARP proceeding, cable was paying an average of only 2.45¢ and 9.8¢, respectively, for the very same signals so a significant fee disparity already existed between the technologies.

⁷ The CARP process replaced the former Copyright Royalty Tribunal which was abolished in 1993.

The 1994 Act, however, changed the rate determination criteria for the CARP sufficiently so as to undermine what should have been the true goal of the panel: determining a rate which was comparable to the rates paid by DTH's competitor, cable. The new statute instructed the CARP to take into account what it perceived as the "fair market value" of the retransmitted broadcast signals. The Act also instructed the CARP to base its decision on "economic, competitive, and programming information" which included, among other factors,

“(i) the competitive environment in which such programming is distributed, the cost of similar signals in similar private and compulsory license marketplaces, and any special features and conditions of the retransmission marketplace....”⁸

Clearly the Act deliberately attempted not to lose sight of the competitive ramifications that the CARP's new fee could embody. It ironically directed the CARP to take into account the very competitive factors which it ultimately chose to ignore.

The CARP's decision stunned the industry. The new fee it recommended to the Librarian of Congress (who oversees the U.S. Copyright Office) was 27¢ for superstation and distant network signals alike - a highly egregious increase for an important program commodity in the DTH (and cable) marketplace. The Librarian adopted the CARP's recommendation and implemented the new fee on January 1, 1998, despite pleas from Congress and an appeal from the SBCA carriers to do otherwise. The Librarian's decision has since been appealed to the U.S. Court of Appeals, and a hearing has been scheduled for January, 1999. In the meantime, the carriers are about to pay into the satellite copyright royalty pool at the new fee level for the period

⁸ Satellite Home Viewer Act of 1994, P.L. 103-369, Section 119(a)(1)(B)(i).

January 1-June 30, 1998. We anticipate that total satellite copyright fees for 1998 could amount to approximately \$95 million, compared to almost \$43 million for all of 1997.

The issue of competition with cable has manifested itself in the copyright law because two competing technologies are paying vastly different copyright fees for the same signals. Compared to the average cable copyright royalty fees, DTH is paying 270 percent more than cable for superstation signals and 1,000 percent more for distant network programming. This disparity is intolerable, particularly in view of the video competition policies which both Congress and the FCC have established with the very real hope that satellite TV will produce a strong challenge to the entrenched cable industry.

Congress must make a decision in order to reconcile its video policies with the right of program creators to fair compensation for the use of their programming. The existing copyright fee structure does not offer the balance which should rightfully exist between competing technologies. In response, bills have been introduced in the Senate and House which attempt to alleviate the situation. S. 1422 introduced by Senators McCain, Burns and Dorgan, and H.R. 2921, introduced by Congressmen Tauzin, Markey and Boucher, seek to stay the implementation of the rate. They direct the FCC to study the effect of the new copyright fees on video competition and to report the results to the Congress. S. 1422 has passed the Senate as an amendment to the Commerce, Justice, State Appropriations Bill and will next go to a Senate-House Conference. The bill would create a stay until March 31, 1999. The House bill has been reported out of the Commerce Committee and has been referred to the Judiciary Committee. More comprehensive copyright reform legislation has also been introduced by Senator Hatch and

Congressman Coble. However, because of disagreement by several industries over sections of both bills, they have been slower to move than those containing a stay of the rates. In any event, while we are cautiously optimistic about the chances for any satellite legislation to be passed this year, the clock is ticking for the DTH industry because the 1994 Act expires on December 31, 1999.

C. The "White Area" Situation: Nothing illustrates more starkly the dysfunction of the SHVA than the recent turn of events which has overtaken the distribution of distant network signals. Last year, we described the situation as a "vast uncertainty." Today it is definite and rampant frustration in view of the severe judgments handed down by the courts in Miami and most recently in Raleigh, NC. Fortunately, the Commission has been asked to play a role in helping to right this crucial matter.

As the FCC well knows, the genesis of the current dilemma lies in the definition of "unserved household" which is the key to whether or not a consumer is eligible to receive network signals by satellite. The statute defines such a household as one that,

"(A) cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network."⁹

While the concept of using the Grade B as a viewing standard may appear to hold logic, in practice it does not and cannot work. First, a consumer can only judge the adequacy of a

⁹ Satellite Home Viewer Act of 1988, P.L. 100-667, Section 119(c)(3)(D)(i).

television signal received off-air by how it looks on the screen. The fallacy of the criterion is that it is totally unrealistic to expect a lay person to evaluate a signal relative to Grade B field strength.

That standard has been developed by the Commission as a predictive measure of signal propagation from a television tower, based on certain inputs to the model. The current Grade B is defined as 50% of households within the contour receiving an adequate signal 50% of the time. Thus, while most households inside a Grade B will be barred from taking satellite network service, many are eligible under the statute because in reality they cannot receive a Grade B signal. The irony lies in the fact that, again, the standard was not developed for the purposes of determining eligibility under the SHVA. It is not a consumer reception standard, and its utilization in the SHVA as the operative determinant of the "white area" provision is counter-productive and does not properly serve the interest of consumers.

The injunction handed down by the U. S. District Court in Miami¹⁰ against PrimeTime 24-distributed network programming further compounds the difficulties already inherent in the SHVA. Stringent rules for the observation of the "white area" eligibility provisions have been overlaid by the court in a manner which only exacerbates an already cloudy and complex set of provisions. The court's model are Longley-Rice propagation maps with predicted inputs of 50/50 at a 30-foot antenna height. Satellite carriers will be exercising great caution in authorizing households which may be close to, but nonetheless outside, a Longley-Rice contour.

¹⁰ United States District Court, Southern District of Florida, Case No. 96-3650-CIV-NESBITT

Furthermore, truly eligible consumers who reside within a Grade B contour but cannot receive a Grade B signal could be deprived of subscribing to network service unless they either appeal to the affiliate for a waiver or conduct an expensive engineering test at their households.

Furthermore, the court also made the injunction retroactive to March, 1997. Because of the uncertainty, it appears that up to 1.2 million DTH households, many of whom may be eligible nonetheless, may lose their network service within the 90-day "turn off" period mandated by the court. We also believe that approximately 400,000 of these households are C-Band subscribers

The industry is trying mightily to comply with the terms of the injunction as rapidly as possible. However the tools and options for shaping their network marketing strategies to those households the Miami court allowed as eligible comprise sophisticated and costly geo-coding and mapping applications. As a result, companies will be electing the "white area" strategy which will blend most readily with their respective marketing resources.

As the Commission knows, two satellite carriers - Netlink and Primestar - have negotiated a "white area" agreement with the broadcast affiliates, through the National Association of Broadcasters. It entails a "red light"/"green light" concept endorsed by both sides, with more favorable eligibility criteria than the Miami court laid down in those zip codes at the fringes of the Grade B contour. Nonetheless, thousands of households that are truly eligible for network service under the law will be denied service because of the zip code parameters of the agreement. SBCA has already received complaints regarding this feature of the pact.

For companies affected by the injunction, however, "white area" marketing strategies are not as clear cut. At least for the time being, some companies have elected not to sign up any new network subscribers, for fear of being in contempt of the court and until they have acquired a satisfactory eligibility regime which can be applied to the court ordered market environment. Others will be choosing to sign up households who are safely eligible and are not likely to be questioned under the court's rules. In any event, companies will move cautiously. Many consumers could be deprived of network service through no fault of their own because of the overly-stringent conditions laid out by the court.

Adding further complexity to the situation is the court's decision in Raleigh, NC, where ABC, Inc. had filed a complaint against PrimeTime24 for violations within the DMA of the local ABC affiliate. Without going to trial, the court issued a summary judgment against PrimeTime 24 on July 16, 1998. A hearing has also been held in order to determine penalties in the case, possibly including those for "willful or repeated pattern or practice" of violations of the SHVA - a condition which could have serious consequences in the DMA.

Some elements of the DTH industry have reacted strongly in order to protect the consumers they serve. The NRTC, which represents and serves the rural satellite TV viewers of America, has filed an emergency petition with the Commission requesting an immediate definition of the Grade B standard in the context of a receiving standard applicable to households under the SHVA. The NRTC filing has substantial merit, and the SBCA has made its own filing in support of what the NRTC is seeking to achieve. The Miami court-ordered injunction against PrimeTime

24 has served to energize the DTH industry to find a more realistic way to solve the "white area" impasse, now compounded further by the court's repressive eligibility rules. NRTC is correct to ask for a definition of Grade B field strength as a reception standard under the SHVA. While it may be adequate to predict propagation characteristics for broadcasters, is it a realistic reception standard for purposes of the SHVA? We don't believe it is. We believe that the 50/50 parameter, for example, does not give a viewer sufficient assurance that a quality off-air picture will be available all of the time using a "conventional rooftop antenna." This and other important questions surrounding the Grade B standard as it relates to the SHVA are important, and we urge the Commission to conduct a proceeding on these matters as soon as possible. The Commission may also want to advise the Miami court of any proceeding which it initiates or intends to initiate.

D. DBS Public Service Obligations: DBS public service still remains an open proceeding on the Commission's rolls. Its outcome, if shaped properly, can have a salutary effect on the DBS service. This will be the first time that a public service obligation will be applied to a national program platform. The key, as the industry has argued in its comments in the rulemaking, is the need for flexibility for each company to choose programming which it believes has both the potential to enhance its existing packages and the quality necessary to appeal to a national subscriber base.

The major issue affecting the industry's need for flexibility revolves around the interpretation of the principle of "editorial control." That has been traditionally meant to apply to alteration of the content of a television signal, and the statute is clear in its intent that the restriction also be applied to the DBS companies. Other parties to the proceeding have argued

that the concept of "editorial control" also prohibits the DBS providers from selecting the public service programming entities they want to carry. We believe that is an erroneous interpretation. Without the ability to select public service programming, DBS platforms simply become transportation vehicles for any programming entity on a first-come, first-served basis. Such a leased access model would not encourage the development of the creative, high quality programming that DBS operators seek in order to build and maintain their national subscriber bases. They would have no say with regard to the quality and appropriateness of the programming, nor would each company have the benefit of using public service programming to distinguish itself from its DBS competitors.

The matter of how to apply the "political advertising" provision of the statute to DBS platforms is also a troublesome issue related to the public service mandate. The statute directs that Sections 312(a) and 315 be applied to DBS and assumes that the provisions can be easily tailored to the satellite model. We do not believe that is a realistic or practical use of the DBS spectrum, and SBCA has urged that access to DBS platforms be limited to Presidential and Vice-Presidential campaign announcements. Allowing access to every candidate for Federal office could well nigh be impossible. We are hard pressed to understand why a national audience would be interested in watching political advertising for regional or statewide races far removed from their viewing locales simply because those announcements had been granted mandatory access to a DBS platform. Using DBS for this purpose would be wasteful of frequency spectrum which would be better utilized for political announcements designed for a national audience.